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Case No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

DERRELL J. CHAMBLEE, and
W. C. MANAGEMENT, INC.,
Petitioners,

vs.

JIM WALTER RESOURCES, INC.
WILLIAM CARR, JAMES SIMS,
HAROLD RICE, and ROBERT POLLARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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LIST OF PARTIES

W. C. Management, Inc. and
Derrell J. Chamblee
("Petitioners")

Jim Walter Resources, Inc.
William Carr; James Sims;
Harold Rice; Robert Pollard
("Respondents")

QUESTIONS PRESENTED FOR REVIEW

I.

Whether where a discovery order is entered by the District Court, which includes a denial of a protective order to limit use of the discovered materials to prosecuting or defending the case itself, compliance with which will make available to a competitor-opposing party confidential business information and trade secrets which can be used to obtain a competitive advantage potentially fatal to the business interests of the party ordered to produce the discovery, such order should be immediately appealable under the collateral order appeal doctrine?

II.

Whether the non-final order appealability rule enunciated in *Gillespie v. United States Steel Company*,379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964) remains a viable exception to the general rule that appeals should be limited to final order as defined in 28 U.S.C. 1291?

III.

Whether a District Court is required under Rule 37, Federal Rules of Civil Procedure, to enter findings as to why no lesser sanction than dismissal and granting judgment for the opposing party will suffice as a sanction for failure to comply with a discovery order prior to the District Court entering as a Rule 37 discovery order violation sanction a dismissal of the violating party's claims and granting judgment for the opposing party?

IV.

Whether a judgment is a final appealable judgment under 28 U.S.C. § 1291 where there are multiple claims and multiple parties and the District Court enters an order

which it denominates a "final" order, but the judgment fails to grant or deny the prevailing party's claim for monetary damages, holding that such claim must be deferred pending the filing of another action in which the non-liquidated money judgment entered in the subject order may be used as a basis for again seeking a liquidated monetary judgment?

V.

Whether a judgment is a final appealable judgment under 28 U.S.C. § 1291 where it does not fully adjudicate one of the claims of the prevailing party?

VI.

Whether a party asserting the attorney-client privilege in a federal civil action has the burden of establishing as a pre-condition to successfully asserting the privilege the following elements by a preponderance of the evidence: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is the member of a bar of a court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and the privilege has been (a) claimed and (b) not waived by the client; (4) the client intended the communication to be confidential; and (5) under the circumstances, it was reasonably understood and expected to remain confidential?

VII.

Whether there is an exception to the general rule prohibiting the immediate appeal of discovery orders where such discovery orders threaten the continued viability of the business interests of the party ordered to produce discovery by delivering into the hands of a competitor the confidential business information and trade secrets on which the continued viability of the business interests of the producing party depends?

VIII.

Whether a court of appeals may substitute its judgment for that of the District Court by increasing the sanctions imposed by the District Court for violation of a discovery order issued by the District Court?

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OPINIONS BELOW

The opinion of the District Court is reproduced in Appendix A14-26. The opinion of the Eleventh Circuit Court of Appeals dated October 19, 1995 affirming, with opinion, the District Court is reproduced in Appendix A6-10. The opinion of the Eleventh Circuit Court of Appeals denying the Petitioner's application for rehearing and rehearing en banc is reproduced as Appendix A-2.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1334(b).

STATUTES INVOLVED

28 U.S.C. § 1291; 28 U.S.C. § 1334(b); *Code of Alabama*, 1975, Sections 8-9A-1, et. seq.; *Code of Alabama*, 1975 §13A-11-122.

STATEMENT OF THE CASE

On December 14, 1990, the Petitioner, W. C. Management, Inc. ("WCM") and the Respondent, Jim Walter Resources, Inc. "(JWR"), signed a coal sales contract which required JWR to sell WCM 170,000 tons of a type of coal known as "middlings" at a price of $17 per ton, the sales to be completed during the succeeding 12 month period. The contract provided in ¶7 for a meeting prior to the end of April, 1991, to decide if the undelivered balance of the coal, if any, would be delivered. Sales began on January 2, 1991, and continued to May 6, 1991, totalling 63,000 tons. (R103). Petitioner Derrell J. Chamblee ("Chamblee") testified he, on behalf of WCM, met JWR's representative prior to the end of April, 1991, and they agreed to complete the contract. JWR denied it.

At some point after the contract was signed, JWR began investigating using the "middlings" coal in blended coal spot orders to Alabama Power. WCM had been making these sales to Alabama Power and JWR had not.

JWR accepted in early May, 1991, a spot order for 300,000 tons of blended coal at a price of $60 per ton. The blend requirements were such that middlings could be used to make up approximately one-third of the coal blend needed to fill this order so that JWR by selling the middlings to Alabama Power instead of WCM could increase its gross profit by $4,300,000.00 (100,000 tons x $43). The limited amount of middlings available required that they be sold either to WCM or Alabama Power.

The JWR executive who made the decision to terminate the coal sales to WCM, Sims, claimed he was not aware JWR had a contract with WCM until May of 1991. When he discovered there was such a contract, he ordered it terminated without reading it. Accordingly, he ordered the contract terminated in the erroneous belief that the ¶7 termination meeting was to be held prior to the end of May, 1991, rather than April. In any event, he testified, on deposition, the decision to terminate sales to WCM was a purely economic one.

The efforts of WCM-Chamblee to convince JWR to change its decision were futile. Accordingly, WCM informed JWR it would not pay for the coal delivered and would sue for damages.

Keith Frazer, vice president of JWR, thereafter informed a Mr. Saiia, president of a company with which WCM and Chamblee had been doing business, that if he did any business with WCM-Chamblee or any of his other companies, JWR would refuse to do business with Saiia. Subsequent to his deposition, Keith Frazer left the employ of JWR and gave Chamblee an affidavit which stated he had been present at a meeting in the office of the

president of JWR when the president, Carr, stated that JWR would not tolerate Chamblee or WCM defying JWR and ordered, "Let's damage him all we can." Carr directed that JWR refused to do business with any entity that did business with Chamblee or any of his companies. Keith Frazer stated that the meeting was not an attorney-client meeting, and stated that, "From that time forward until I left (JWR) in the Fall of 1991, it was the official company policy of (JWR) that it would not do business with Mr. Chamblee or with anyone who did do business with Mr. Chamblee or his companies." (R62). Hal Frazer's affidavit detailed a specific instance of a major coal land project that he as an officer of United Land Company, a separate corporate affiliate of JWR, had been ordered by JWR executives to cancel solely because Chamblee and WCM were involved. (R61).

On July 16, 1991, JWR filed a complaint in the District Court against W. C. Management ("WCM") alleging that WCM on December 14, 1990, entered into a contract with JWR for the purchase of coal and that WCM purchased thereunder $904,775.80 worth of coal and failed to pay. JWR, a bankrupt corporation then in Chapter 11 reorganization proceedings, alleged jurisdiction under 28 U.S.C. 1334(b). (R1). WCM filed an answer and counterclaim denying any debt; alleging as a defense and as a counterclaim that JWR breached the contract; and alleging that JWR had tortiously interfered with its business and contractual relationships. (R44).

On January 11, 1993, JWR amended the complaint to add a claim against Chamblee, the principal figure in WCM, under the Alabama Fraudulent Transfer Act ("AFTA"), *Code of Alabama*, 1975, Sections 8-9A-1, et. seq. On April 8, 1993, Chamblee filed a counterclaim alleging tortious interference with his business and contractual relationships against JWR and, added additional as defendants, four executive officers of JWR. (R52). JWR filed

a motion for summary judgment as to WCM's tortious interference claim, which was granted. (R25). WCM filed a motion to reconsider which was denied. WCM's motion for a protective order against the misuse of discovery by JWR by limiting its use to this litigation was denied. The District Court granted JWR's motion to compel discovery. (R44; 84).

On August 12, 1993, the District Court on motion by JWR struck the affidavits of Keith and Hal Frazer, which contained direct evidence of JWR's deliberate policy of tortious interference with WCM's and Chamblee's business and contractual relationships, on the ground that the information therein was protected from disclosure by the attorney-client privilege. (R86). The District Court not only directed that the affidavits be stricken, but further ordered counsel for WCM-Chamblee not to use or refer to them in any way.

The discovery sought by JWR and ordered by the District Court to be produced, without benefit of a protective order, included *all* of WCM's and Chamblee's business and financial records without limitation. At the time he ordered this unlimited discovery, the District Court had before him direct and circumstantial evidence that JWR had a corporate policy that it would inflict all the trade and financial damage it could inflict on Chamblee and companies in which he had an interest. There was direct evidence of two specific instances, where JWR had intimidated companies into not doing business with Chamblee and his companies. The District Court nevertheless ordered that *all* business and financial records of Chamblee and WCM be turned over to JWR for it to use and refused to enter a protective order limiting its use to this litigation. WCM and Chamblee twice attempted to appeal this discovery order to the Eleventh Circuit and to stay it while the appeals were pending. No stays were granted and the appeals were denied because of lack of

jurisdiction. See Eleventh Circuit Case Nos. 93-6751 and 94-6079.

On December 29, 1993, while Chamblee-WCM had a motion for stay of the discovery order pending in the Eleventh Circuit, the District Court entered an order dismissing as a discovery sanction all claims of WCM-Chamblee against all parties, including individual JWR executive defendants who had never sought any discovery or any relief related thereto. (R93). The order allowed WCM-Chamblee to petition for reinstatement of their claims though without any commitment it would be granted, and imposed conditions precedent on even the consideration by the District Court of such petition. The conditions were draconian and such that WCM-Chamblee could not meet. Among the pre-conditions were that WCM-Chamblee waive all attorney-client privilege claims as to the discovered materials and that counsel for and certain employees of WCM-Chamblee certify to the District Court the completeness of all discovery. Counsel and the employees would have to make certifications they had no knowledge to make. The District Court denied WCM-Chamblee's motion to certify this order as final under Rule 54, FRCivP. No warning was given before this order was issued that sanctions were imminent. No findings of fact were made as to why the extreme sanction of dismissal was required.

The District Court as a further sanction awarded JWR a default judgment against Chamblee. The District Court held WCM was insolvent from the first sale of coal to it by JWR and all transfers from WCM to Chamblee were fraudulent after that first coal sale date. These holdings were imposed as sanctions. The District Court never found that there were in fact any transfers. (R111). JWR never requested any such finding.

On June 29, 1994, the court entered as a further sanction an order which he styled as "Final", granting JWR's

motion for summary judgment against WCM in the amount of $1,074,714.23 and re-entering the default judgment against Chamblee under the AFTA. (R115). On July 8, 1994, JWR filed a motion to alter or amend the judgment against Chamblee because it was not for a sum certain. (R117). On July 21, 1994, the District Court refused to enter a judgment for a sum certain against Chamblee, holding that he did not "view such relief as appropriate in the context and posture of the given case." (R118).

WCM-Chamblee appealed again following the June 29, 1994 order. JWR cross-appealed the refusal of the district court to enter a judgment for a sum certain. During the pendency of the appeal, JWR filed a garnishment against Chamblee requiring him to state the amount he owed WCM, including any amount due under the default judgment. The garnishment proceeding under Rule 69, FRCivP, was based on Alabama law. Chamblee unsuccessfully sought a stay of the garnishment proceeding in the District Court and in the Eleventh Circuit. Chamblee answered the garnishment admitting a debt to WCM in a sum certain. JWR did not contest the amount admitted by Chamblee.

On October 19, 1995, the Court of Appeals panel in an unpublished opinion held that none of the issues raised by WCM-Chamblee merited discussion and affirmed the district court without opinion under Rule 36-1. App. A-8. The panel held that the judgment of the district court was final under 28 U.S.C. 1291.

On JWR's cross-appeal, the panel held the district court erred in refusing to enter judgment for a sum certain because: (1) the district court had the authority to enter a money judgment under AFTA; (2) "it is impossible to levy execution on an unspecified sum of cash that has been mingled with other assets"; (3) JWR is left without a remedy; and (4) equity considerations require that

a judgment for a sum certain be entered. The panel recognized that the District Court had "granted one of the several remedies available under the AFTA.: "However, the District Court "suggested that JWR institute a separate action for a money judgment under the AFTA relying upon the findings, declarations, and judgments in the action." App. A-12. The panel stated, "We hold that the district court erred in failing to enter judgment against Chamblee for a definite sum." *Id.*, 6. Petitioners filed with the Eleventh Circuit a timely Petition for Rehearing and Rehearing *En Banc*. This petition was denied on January 31, 1996. App. A-2.

REASONS FOR GRANTING THE WRIT

I. There Is A Split In The Circuits As To Whether Orders Mandating The Discovery Of Trade Secrets Are Precluded As A Matter Of Law From The Scope Of The *Cohen* Collateral Order Appeal Doctrine And This Court Should Resolve The Issue

This Court held in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), recently supplemented by *Gulfstream Aerospace Corporation v. Mayacomos Corporation*, 485 U.S. 271, 276, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1980), that interlocutory orders could be appealed immediately upon their entry if the order sought to be appealed met three conditions: (1) the order must "conclusively determine the disputed question"; (2) it must "resolve an important issue completely separate from the merits of the action."; (3) it must be "effectively unreviewable on appeal from a final judgment."

There is a split among the circuits as to whether a discovery order as a matter of law is precluded from immediate appealability under the collateral order doctrine of *Cohen* or supplemented by the *Mayacomos* case.

In *Smith v. BIC Corporation,* 869 F.2d 194, 198 (3rd Cir. 1989), the court held that the Third Circuit had "never held as a blanket rule that discovery orders are not appealable." The approach used by the Third Circuit is that where the discovery can meet the three prong test of *Cohen,* it is immediately appealable under the collateral order appealability doctrine. *Id.* Accordingly, in *BIC* the Third Circuit held that a discovery order compelling discovery of trade secrets was immediately appealable under the *Cohen* doctrine because the order finally required the trade secrets be produced without any choice on the part of BIC as to how they would be disseminated in the absence of a protective order, the issue of whether something is a trade secret can be decided separately from the merits of the case, and once the secrets are turned over without a protective order, they are no longer secrets. *Id.,* 869 F.2d at 198-199.

The Fourth Circuit rejected the *Smith v. BIC Corporation* decision in *MDK, Inc. v. Mike's Train House, Inc.,* 27 F.3d 116, 120 n.2 (4th Cir. 1994). The Fourth Circuit found that *BIC* created "an exception to the general rule that discovery orders are not appealable ... and we do not follow it here." *Id.* The *MDK* court pointed out that one could obtain review of a discovery order by refusing to obey it, being cited for contempt, and appealing the contempt citation attaching the discovery order, *Id.* at 121. The court apparently overlooked the fact that sanction orders might be entered under Rule 37(b)(2), FRCivP, that would result in dismissal of the objector's claims and judgment on the discovering party's claims.

In any event, a panel of the Fifth Circuit in *Texaco, Inc. v. Louisiana Land and Exploration Company,* 995 F.2d 43, 45 n.4 (5th Cir. 1993), surveyed the Circuits and concluded that all of them except the Third Circuit held that discovery orders were not within the *Cohen* Rule. However, in order to dismiss the appeal in *Texaco,* the panel

was required to hold that two other panel decisions, *Acosta v. Tenneco Oil Co.,* 913 F.2d 205, 207-208 (5th Cir. 1990) and *Southern Methodist University Association of Women Law Students v. Wynne & Jaffe,* 599 F.2d 707, 712 (5th Cir. 1979), had to give way to an earlier panel decision, *Honig v. E. I. duPont de Nemours & Company,* 404 F.2d 410 (5th Cir. 1968), in order to rule in *Texaco* that discovery orders are not appealable under the *Cohen* doctrine. *Texaco,* 995 F.2d at 43-44. It is, therefore, questionable as to the Fifth Circuit law on the issue.

The Tenth Circuit also held in *Covey Oil v. Continental Oil,* 340 F.2d 993 (10th Cir. 1965), that orders mandating the discovery of trade secrets are appealable. In *Federal Trade Commission v. Alaska Land Leasing, Inc.,* 778 F.2d 577 (10th Cir. 1985) another panel of the Tenth Circuit held that a non-party witness in a civil proceeding could not appeal an order compelling him to appear for a deposition. In the course of the opinion, the panel held that *Covey* had been impliedly overruled by *United States v. Ryan,* 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971). This conclusion is not justified because *Ryan* involved an attempt to take an interlocutory appeal of a grand jury subpoena a subject not comparable to a pre-trial discovery order in a civil action and certainly not a subject to which *Cohen* ever was thought to apply.

The better reasoning on the issue of whether discovery orders which compel disclosure of non-recoverable trade secrets or confidential business information without a protective order are immediately appealable under the *Cohen* rule is clearly found in *Smith v. BIC, supra.* The purpose of discovery under the Federal Rules of Civil Procedure ought to be to get information to use to prosecute or defend the merits of a civil action, not to seek out material that is so critical to the interests of one party that the party cannot turn it over in the absence of a protective order without being at risk greater than that

posed by the risk of losing the civil action. Only the naive believe that the present day civil litigation discovery "game" is played only for the purpose of obtaining information. Rather, discovery has become an important element in the game of litigation "hardball." Too often, discovery becomes not a search for information, but a tactic. It is too obvious for debate that if one can get a discovery order broad enough and without the limitation of a protective order against a competitor in a civil action, all manner of benefits may follow from this advantage. The benefits range from more favorable settlements to, as in the instant case, forcing one's opponent to choose between financial survival and continuing the lawsuit.

The situation presented by the instant case is classic. A supplier, who was also a potential competitor, saw a chance to triple profits by going around its customer to his customers and eliminating the middle man. When the original customer fought back, the supplier attacked. The result was litigation and an effort by JWR, the biggest player in the Alabama coal market, to put WCM and Chamblee out of business. Former employes of JWR and one of its affiliates revealed the corporate strategy of JWR to destroy the business of WCM and Chamblee, but the District Court threw out for all purposes the affidavits by which these former employees made the direct revelations of the criminal and tortious policy of JWR on the basis that the information revealed by the former employees was protected from disclosure by the attorney client privilege. The District Court then ordered WCM and Chamblee to turn over to JWR, whose corporate policy of destroying them was clearly known to them, *all* of their business records without qualification or limitation. The District Court refused even to limit JWR's use of the discovery by a simple protective order restricting the use of the material to the litigation, its only legitimate use.

Thus, all of the customers of WCM and Chamblee, the prices at which they bought, the amounts they purchased, the times, the purchasing decision makers, the suppliers and prices, the financing arrangements, all turned over to JWR which had brought on the problems by breaching its contract with WCM so it could steal WCM's prime customer and take the profit for itself and who had a clear and avowed corporate policy to do all it could to destroy WCM and Chamblee. Frantically, WCM and Chamblee sought to appeal in order to get out of this destructive box in which they had been placed and which had nothing to do with the merits of the action. Surely, *Cohen* must apply here if anywhere!

But the Eleventh Circuit repeatedly denied it had jurisdiction of the appeals because there was no final judgment. *Cohen* does not apply to discovery orders. So, WCM and Chamblee were sanctioned to destructions in the litigation, despite their massive productions of documents, directly and through their accountants and bankers.

The reason there can be no absolute prohibition as a matter of law prohibiting the appeal of discovery orders under the *Cohen* doctrine is because of cases such as this one. This court should resolve the split in the Circuits and adapt the rule of appeal of discovery orders set forth in *Smith v. BIC*, supra.

The issue which finally reached the Eleventh Circuit was not the propriety of the discovery order and denial of the protective order. Rather, by that point the issue had become transmuted into one of whether the District Court had abused his discretions in granting the severe sanctions he granted. Therefore, the pure issue sought to be reviewed on the interlocutory, collateral order appeals which were dismissed for lack of jurisdiction was never presented and could never be presented on an interlocutory basis. Thus, reversal in mandated.

II. The Lower Federal Courts Are Ignoring The Decisions Of This Court In *Gillespie v. United States Steel Company*, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964) And This Court Should Use Its Supervisory Power To Require Compliance.

WCM and Chamblee in all of their efforts to take on interlocutory appeal of the discovery order and the denial of a protective order in this case have cited *Gillespie v. United States*, supra, and relied on the rule it established to provide the Court of Appeal with jurisdiction to hear the appeal. The Eleventh Circuit has steadfastly ignored the case. A survey of the legal field shows the case has sufrred a similar fate among the other circuits. Yet, its common sense approach to the allowable basis on which interlocutory orders may be appealed is a needed supplement to the *Cohen* rule.

In *Gillespie*, this court held that in determining whether a party may appeal from an interlocutory order, the requirement of finality must be given a practical rather than a technical construction. *Gillespie* established that in making the decision of practical finality the court must weigh the competing considerations of the "inconvenience of piecemeal review on the one hand and the danger of denying justice by delay on the other." Moreover, the appellate court should take into consideration whether the cost would be less by hearing and deciding the case by trial with the question unresolved, reviewing them after trial, and remanding for a new trial. *Id.*, 379 U.S. at 152-154.

Thus, *Gillespie* focuses on the need to balance the inconvenience of interlocutory appeals against the worse possibility of denying justice by denying appeal until after the final judgment is entered. This rule applied to the instant facts would have required the balancing test prescribed by *Gillespie* to be performed when the appeals filed by WCM and Chamblee seeking review of the

"death knell" discovery order was dismissed for lack of jurisdiction in a process that did not include the *Gillespie* balancing test.

III. The Issue Of Whether Prior To Dismissing An Action As A Discovery Sanction Under Rule 37, Federal Rules Of Civil Procedure, The District Court Must Make Findings Of Fact As To Why No Lesser Sanction Will Suffice Is An Important Issue Of Federal Law Which The Court Should Decide

The provisions of Rule 37 (b)(2), FRCivP, allow for the impositions of sanctions when a party to the litigation has failed to obey an order of the District Court directing that certain discovery take place. This Court in *Insurance Corporation of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 707, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) has imposed two basic limitations on the power of a District Court to impose sanctions under this section: (1) the sanction must be "just," and (2) the sanction must relate to the particular claim to which the discovery order is addressed. This court has further held that express warnings should be issued before sanctions are imposed. This Court stated, "Because the District Court's decision [to issue discovery sanctions] was accompanied by a detailed explanation of the reasons for that order and because that decision was upheld as a proper exercise of the District Court's discretion by the Court of Appeals, this issue [the propriety of the discovery sanctions] need not detain us long." *Id.* at 456 U.S. 702. This holding comes very close to one that a sanction of finding an issue against a party based on a discovery order violation requires a statement of facts as to why lesser sanctions will not suffice, but falls short of the precise holding sought here.

In the earlier case of *Hammond Packing Company v. Arkansas,* 212 U.S. 322, 350-351, 29 S.Ct. 370, 53 L.Ed. 530 (1909), the Court held that procedural rules which allowed sanctions for violation of discovery rules that include resolution of contested issues against the non-discoverying party implicate due process concerns. The question in such cases was not whether the Court of Appeals or this Court would have applied the sanctions as an original matter, but "whether the District Court abused its discretion in so doing." *National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 642, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976). Clearly, the decision as to whether the District Court abused its discretion is based on the facts as found by the District Court. A finding of those facts as to why a lesser sanction than dismissal will not suffice is an essential part of this process of sanction imposition and review.

The *National Hockey League* case represents the correct manner in which a District Court should proceed prior to granting the extreme sanction of dismissal under Rule 37 for violation of a discovery order. The District Court gave warnings that dismissal would occur unless the discovery order was obeyed and, when this did not suffice, prepared a lengthy statement of facts as to why the District Court was of the opinion the sanction of dismissal was appropriate. *Id.,* at 427 U.S. at 639-641. This Court stated:

> "While the Court of Appeals stated that the District Court was required to consider the full record in determining whether to dismiss for failure to comply with discovery orders. [citation omitted] we think that *the comprehensive memorandum* of the District Court supporting its order of dismissal indicates that the court did just that." *Id.*, 427 U.S. at 642.

The Court will note from this decision that the memorandum at issue in *National Hockey League* speaks of warnings that sanctions would follow if the discovery order was not obeyed. *Id.*, 427 U.S. at 640-641. Again, while *National Hockey League* was affirmed because of the District Court memorandum stating the reasons the sanction of dismissal was mandated, the case stops short of holding that such findings are *required* prior to a dismissal or a discovery sanction under Rule 37.

In *Phipps v. Blakeney,* 8 F.3d 788, 791 (11th Cir. 1993), the court held that because of the egregious facts in that case the District Court would not be required to make specific findings as to the reasons that a lesser Rule 37 sanction than dismissal would not suffice. However, the court held that making such specific findings was "good practice."

> "To state why lesser sanction will not do is a good practice on the part of the district court using dismissal as a sanction. This information helps us in reviewing the dismissal; and, as our case law shows, the failure to explain why a lesser sanction was not used may result, in the close cases, in a reversal or vocation of an order of dismissal." *Id.*

In *World Thrust Films, Inc. v. International Family Entertainment, Inc.*, 41 F.3d 1454, 1456-1457 (11th Cir. 1995), the Eleventh Circuit reversed a District Court order dismissing as a sanction under Rule 41(b) an action wherein the District Court had failed to make specific findings as to why a lesser sanction would not suffice. The court based its reversal solely on the failure of the District Court to make these specific findings and refused to even consider the record in the absence of such specific findings.

In the *Phipps* case, supra, the court sought to distinguish between the requirements for specific findings in

Rule 41(b) dismissals as opposed to Rule 37(b)(2) dismissals by attributing Rule 41(b) dismissals to lawyer misconduct and Rule 37(b)(2) dismissals to party failures. The court noted a greater reluctance to punish litigants for their lawyers' errors than for their own errors as the reason for *requiring* specific findings in Rule 41(b) situations. This distinction lacks merit however, since the purpose of the specific findings is to aid the reviewing court in assessing whether the District Court abused its discretion in awarding the sanction. *World Thrust Films*, supra, 41 F.3d at 1456-1457.

The present case illustrates the need for such specific findings. WCM was trapped between the District Court's discovery order requiring production of *all* its business records, and turning over those records to a business competitor, without benefit of a protective order, who could use those records to carry out its stated corporate policy of destroying WCM. Chamblee was in the identical position. They were desperately seeking to obtain appellate review of this discovery order. They turned over huge amounts of discovery to JWR, so much that JWR did not even look at most of it. WCM and Chamblee were not contamocious. They were just trying to survive. Under these conditions, a statement of specific findings of fact as to why, based on the whole record, the severe sanctions of dismissal and default judgments were required should be an obvious prerequisite of imposing these sanctions.

This Court should expand the foundations already well laid in *Insurance Company of Ireland*, supra, and *National Hockey League*, supra, and require specific findings of fact as a required condition precedent to a District Court awarding the sanctions of dismissal and default judgment for violation of discovery orders under Rule 37(b)(2), FRCivP.

IV. This Court Should Decide The Important Federal Question Of The Nature And Extent Of The Burden Of Proof Which Must Be Met By A Party Asserting That Information Is Protected From Disclosure Because Of The Attorney-Client Privilege

The panel of the Eleventh Circuit which decided this case held that the claim by WCM and Chamblee that the District Court erred in striking the affidavits of the former employees of JWR who gave direct testimony of the establishment by JWR of a corporate policy to destroy WCM and Chamblee financially and in their business and contractual relationships on the basis that this information was protected by the attorney-client privilege was without merit and would not be discussed in the opinion. Appendix A-8.

On August 12, 1993, the District Court held, without any hearing, that " . . . defendants and their counsel and any witness they may call at trial are hereby ORDERED to refrain from making any reference to the contents of the conversations referred to in the Frazer affidavits. . . " In one sweeping injunctive order the direct evidence of JWR's and the other Respondents' tortious and criminal conduct was swept away. The basis given by the District Court for this sweeping injunction was, "It is clear to the court that Keith Frazer and Hal Frazer deliberately and knowingly took action *designed to damage JWR* by disclosure to Derrell Chamblee of alleged statements and conversations *which they knew* were the subject of a claim by JWR of privilege." (emphasis supplied). (R86). This conclusion by the District Court necessarily involved a credibility finding since the former employees gave other reasons in their affidavits for making the referenced disclosures to Chamblee and signing the affidavits. There was no hearing at which the District Court could have observed the former employees to obtain a basis on which to make the credibility finding necessary to support such

an adverse finding of fact. JWR has offered *no evidence* to support a finding that the former employes gave the affidavits in a design to damage JWR. One former employee gave as his reason for signing the affidavit that JWR's officials and counsel had "attempted to intimidate me, threaten my employment, place undue pressure on me to slant my testimony in their favor, mislead, and misrepresent me." The other gave as his reason that he wished to give a more complete statement about this case because he had been prevented by JWR counsel from telling the true facts. There is no evidence in the record which contradicts these statements, but even if there were the District Court had no basis on which to make a credibility choice.

The attorney-client privilege is not a favored evidentiary concept in the law since it serves to obscure the truth and the privilege should be narrowly construed. *U.S. v. Suarez*, 820 F.2d 1158 (11th Cir. 1987), *cert. denied*, 484 U.S. 987. See also, *U.S. v. White*, 950 F.2d 426 (7th Cir. 1991) (Privilege is narrowly construed because in derogation of the truth); *Westinghouse Electric Corp. v. Republic of Philippines*, 951 F.2d 1414 (3rd Cir. 1991) *(Privilege is narrowly construed because it obstructs truth-finding process); U.S. v. Goldberger & Dubin, P.C.*, 935 F.2d 501 (2nd Cir. 1991) (Privilege cannot stand in face of countervailing law or strong public policy and should be strictly confined within narrowest possible limits).

JWR made *no showing* of any kind as to the required elements to establish that the privilege applied, merely asserting that it applied. *The one asserting the attorney-client privilege must bear the burden of establishing that it applies. Swain v. Terry*, 454 So.2d 948 (Ala. 1984); *United States v. Noriega*, 917 F.2d 1543, 1550 (11th Cir. 1990). In *Noriega*, this Court held that one who successfully asserts attorney-client privilege has the burden to establish the following required elements:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [the] member of a bar or a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. *(Id.,* 21)

Federal law holds the attorney-client privilege does not protect communications made in furtherance of a crime or a tort. *E.g., In re Federal Grand Jury Proceedings 89-10 (MIA),* 938 F.2d 1578 (11th Cir. 1991); *In re Grand Jury Proceedings*, 517 F.2d 666, 670 (5th Cir. 1975); *In re Grand Jury Proceedings*, 689 F.2d 1353 (11th Cir. 1982); *In re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987). A two prong test determines whether the crime, fraud or tort exception applies: (1) there must be a prima facie showing that the client was engaged in criminal, fraudulent, or tortious conduct when he allegedly sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice; (2) there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or closely related to it. The second prong is satisfied by a showing that the communication is related to the criminal, fraudulent, or tortious activity established under the first prong. *Id.,* 842 F.2d at 1226-27; *In re Grand Jury Proceedings, supra,* 517 F.2d at 670; *In re Grand Jury Investigation, supra,*842 F.2d at 1226.

The statements and orders of JWR and the Respondents, all JWR executives, reported by the Frazers in their affidavits constitute a crime under Alabama law. *Code of Alabama*, 1975, § 13A-11-122, provides:

> Two or more persons, who, without a just cause or legal excuse for so doing, enter into any combination, conspiracy, agreement, arrangement or understanding for the purpose of hindering, delaying or preventing any other persons, firms, corporation or association of persons from carrying on any lawful business shall be guilty of a misdemeanor.

The Alabama courts have held that this statute was designed to prevent unlawful interference with a lawful business. *Beasley-Bennett Electric Co. v. Gulf Coast Chapter of National Electric Contractors Association*, 273 Ala. 32, 134 So.2d 427 (1961).

The constitutionality of this statute has been upheld as a valid exercise of the state's police power. *Lash v. State*, 244 Ala. 48, 14 So.2d 229 (1943), 31 Ala. App. 121, 14 So.2d 235 (1943), *cert. denied*, 244 Ala. 568, 14 So.2d 242, *cert. denied*, 320 U.S. 784 (1943). The Alabama Supreme Court held, "... a distinct and substantive offense is committed when the unlawful agreement is entered into" and "the several acts *or declarations on the part of any of the conspirators* in connection with and in furtherance of the common purpose, before the commission of the offense, may be shown in evidence." (emphasis supplied) (14 So.2d at 232). The participation in the conspiracy of the Respondent Rice, the attorney whose presence supposedly invoked the privilege, makes Rice himself guilty of a crime. *Ex parte Griffith*, 278 Ala. 344, 178 So.2d 169 (1965).

The mere communication with an attorney does not warrant the presumption of confidentiality. *In re Grand*

Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984). The privilege "protects only those disclosures–necessary to obtain informed legal advice–which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976) (emphasis supplied). An attorney-client relationship with an employee of a client may not be created without the employee's consent. *Brown v. St. Joseph County*, 148 F.R.D. 246, 250-251 (N.D. Ind. 1993). The affidavits of the former JWR employees submitted by WCM and Chamblee to show direct proof of the conspiracy to destroy their business and financial interests make it very clear that (l) legal advice was not sought in these meetings, and (2) the former employees never agreed to be bound by an attorney-client privilege in the three meetings in question.

It is also well settled that when an otherwise privileged communication is disclosed to a third party, the privilege is waived. *United States v. Davis*, 636 F.2d 1028, 1043 n.18 (5th Cir.), *cert. denied*, 454 U.S. 862, 102 S.Ct. 320, 70 L.Ed.2d 162 (1981); *U.S. v. Rockwell International*, 879 F.2d 1255, 1265 (3rd Cir. 1990).

The application of these rules of law to the facts in this case establishes that the district court was in error in shielding the statements and conduct of JWR and its executives behind the attorney-client privilege because: (1) JWR and the other Respondents made no effort to meet the burden of showing the necessary elements for the privilege to be applicable; (2) the conduct and statements involved were in commission and furtherance of a crime and a tort and not subject to attorney-client privilege protection; (3) the former employees never consented to be bound by any attorney- client privilege; and (4) the privilege even if it once existed was waived by disclosure of the statements and acts to third persons in the ordinary course of JWR's business.

It is clear that both the District Court and the Eleventh Circuit felt that there was no requirement that a party in a civil action meet the requirements of *United States v. Noriega, supra,* to establish its entitlement to claim the attorney-client privilege and conceal information detrimental to it behind that privilege. Accordingly, neither court even discussed the issue of the standard to be employed by a court in determining whether to apply the attorney-client privilege. The District Court applied the standard that since the former employes were taking action "designed to damage JWR" and since "they knew" JWR was claiming the privilege prevented their disclosure of this information, that was enough to bar the disclosure of the information. The District Court cited no authority for the "standard" he used because there is none. Yet, the Eleventh Circuit found that the District Court was so far inside his discretion in utilizing this standard that the matter did not even merit discussion.

In this situation, the exercise of this Court's supervisory power over the federal courts and the need for this Court to decide an important issue of federal law coincide to require that the Court impose the *Noriega* standard on parties in civil actions who seek to invoke the attorney-client privilege.

Needless to point out, if the District Court had not stricken these affidavits, none of the pre-discovery dispute summary judgments could have been granted, the District Court could not have granted JWR unlimited discovery of *all* the confidential business data and trade secrets of WCM and Chamblee. The striking of these affidavits must be reversed and the case reversed for reconsideration from the point, prior to the discovery dispute, when the affidavits were stricken.

V. The Court Should Exercise Its Supervisory Authority Over The Federal Courts To Decide That A Judgment Is Not Final Under 28 U.S.C. §1291 Where The District Court Merely Refuses To Decide One Of The Claims Presented

The Eleventh Circuit panel which decided this case held that, "Contrary to WCM's contention, the court did resolve JWR's claim for a money judgment. The court simply declined to enter a money judgment . . . " Appendix A-7. The panel concluded that, "We hold that the district court erred in failing to enter judgment against Chamblee for a definite sum." Appendix A-9.

The reasoning of the panel is seriously flawed. The District Court did not simply refuse to enter a money judgment against Chamblee, he refused to bring the case to a conclusion. There was clear contemplation by the District Court that further proceedings would be required to resolve the issues between the parties. No one could rationally believe that JWR would not be forced to take other steps to collect the judgment against Chamblee and that this could not be done without further proceedings. The law seems clear that an order is not "final" for 28 U.S.C. §1291 purposes if it contemplates further proceedings. *Mekdeki v. Morrell National Laboratories,* 711 F.2d 1510, 1523 (11th Cir. 1983).

Moreover, the June 29, 1994 order at issue here was not final in another aspect. The order never found that any fraudulent transfers did in fact take place. The order only found that if any transfers within the ambit of the order did take place, they were fraudulent under the AFTA. Moreover, the application of AFTA was not a decision on the merits, it was a *discovery* sanction. In *Mathis v. Zant,* 903 F.2d 1368, 1371 (11th Cir. 1990), the Eleventh Circuit held that in both criminal and civil cases, a final judgment for purposes of 28 U.S.C. §1291 "has always

been defined as a judgment that terminates the litigation between the parties on the merits of the case, so that if there should be affirmance the court below would have nothing to do but execute the judgment or decree it had already rendered."

In *Fort v. Roadway Express, Inc.*, 746 F.2d 744, 747-748 (11th Cir. 1984), the court held that, "A district court order, such as the one now presented that determines only the liability aspect of a claim for an unliquidated monetary award, has *never* been held to be a final appealable judgment and we decline to hold such here." (emphasis supplied). *See also, Liberty Mutual Insurance Company v. Wetzel*, 424 U.S. 737, 744, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976); *Discon, Inc. v. Nynex Corporation*, 4 F.3d 130, 132-133 (2nd Cir. 1993); *Hain Pure Food Company, Inc. v. Saiia Food Products Company*, 618 F.2d 521, 522 (9th Cir. 1980). The judgment does not meet the requirement that even an order to be a judgment subject to certification under Rule 54(b) FRCivP, it *must* be an ultimate disposition of an individual claim entered in the course of a multiple claim action. *See, Curtiss-Wright Corporation v. General Electric Company*,446 U.S. 1, 7, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980).

The holding by the Eleventh Circuit panel in this case that a district judge can enter a final judgment under 28 U.S.C. § 1291 by simply leaving to another day and another action the resolution of claims presented in a case while other claims in the same case are resolved has departed from the settled authorities and redefined "final judgment" in a way alien to the meaning of that concept embodied in statutes and the decisions of this Court. This Court should in the exercise of its supervisory power and by way of enforcing compliance with its decisions reverse the panel opinion.

VI. The Eleventh Circuit Opinion Substitutes The Judgment Of The Panel For That Of The District Court, Without Deference To The Abuse Of Discretion Standard, And Increases The Severity Of The Discovery Sanction Imposed By The District Court In Violation Of Settled Authority Requiring This Court To Exercise Its Supervisory Authority

The Eleventh Circuit panel opinion, without even a discussion or mention of the abuse of discretion standard, substitutes the judgment of the panel for that of the District Court and holds that the District Court erred in failing to impose sufficiently severe sanctions on WCM and Chamblee. The panel, therefore, ordered the District Court to increase the severity of the sanctions by, (1) imposing a liquidated money judgment against Chamblee, and (2) setting that money judgment at levels deemed appropriate by the panel. Appendix A-10.

The imposition of sanctions for failure to provide discovery in the federal courts has prior to the panel opinion rested within the sound discretion of the District Court and the federal appellate courts have lacked the power to reverse or overturn the District Courts' decisions in this regard except for abuse of discretion. *National Hockey League v. Metropolitan Hockey Club, Inc.*,427 U.S. 639, 642, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976); *Buchanan v. Bowman*, 820 F.2d 359, 361 (11th Cir. 1987).

The panel opinion in the instant case clearly substituted its judgment on a *de novo* basis for that of the District Court in reversing the District Court and increasing the severity of the sanctions imposed. This action is in violation of existing federal appellate procedure and represents an expansion of federal appellate power in violation of the opinions of this Court. The opinion must be reversed.

CONCLUSION

For the reasons set out above, the Petition for Certiorari in this case must be granted.

Respectfully submitted,

Roger C. Appell
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Birmingham, Alabama 35203
(205) 252-9462

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-6605

JIM WALTER RESOURCES, INC.,

Plaintiff-Counter-Defendant-
Appellee, Cross-Appellant,

WILLIAM CARR; JAMES SIMS; HAROLD RICE;
ROBERT POLLARD; JIM WALTER INDUSTRIES, INC.,

Counter-Defendants,

versus

W.C. MANAGEMENT, INC;
DERRELL CHAMBLEE,

Defendants-Counter-Claimants-
Appellants, Cross-Appellee.

No. 94-6752

JIM WALTER RESOURCES, INC.,

Plaintiff-Counter-Defendant-
Appellee,

WILLIAM CARR; JAMES SIMS; HAROLD RICE;
ROBERT POLLARD; JIM WALTER INDUSTRIES, INC.,

Counter-Defendants,

versus

W.C. MANAGEMENT, INC.;
DERRELL CHAMBLEE,

Defendants-Counter-Claimants-
Appellants.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: EDMONDSON and COX, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ alallall R. Cox
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

January 31, 1996

Roger C. Appell \A
2001 Park Place North, Suite 1010
Birmingham, AL 35203

RE: 94-6605 Walter Resources v. W.C. Management
DIST. CT. NO. - 91-01619 CV-H-S

Other addressees: Robert E. Moorer
Samuel C. Campisi
Dennis George Pantazis
Robert L. Wiggins
John H. Morrow
Phillip J. Carroll III
Perry D. Mathis BIRM
Hon. James Hancock
Richard J. Ebbinghouse \A

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

January 31, 1996

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 94-6605 Walter Resources v. W.C. Management
DC DKT NO.: 91-01619 CV-H-S

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

/s/ Miguel J. Cortez
MIGUEL J. CORTEZ, Clerk

Reply To: Deborah Owens (404) 331-6147

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-6605

D. C. Docket No. CV-91-H-1619-S

JIM WALTER RESOURCES, INC.,

Plaintiff-Counter-Defendant-
Appellee, Cross-Appellant,

WILLIAM CARR; JAMES SIMS; HAROLD RICE;
ROBERT POLLARD; JIM WALTER INDUSTRIES, INC.,

Counter-Defendants,

versus

W. C. MANAGEMENT, INC.;
DERRELL CHAMBLEE,

Defendants-Counter-Claimants-
Appellants, Cross-Appellee.

No. 94-6752

D. C. Docket No. CV-91-H-1619-S

JIM WALTER RESOURCES, INC.,

Plaintiff-Counter-Defendant-Appellee,

WILLIAM CARR; JAMES SIMS; HAROLD RICE;
ROBERT POLLARD; JIM WALTER INDUSTRIES, INC.,

Counter-Defendants,

versus

W. C. MANAGEMENT, INC.;
DERRELL CHAMBLEE,

Defendants-Counter-Claimants-Appellants.

Appeals from the United States District Court
for the Northern District of Alabama

(October 19, 1995)

Before EDMONDSON and COX, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

W. C. Management, Inc. ("WCM"), and Derrell Chamblee, WCM's sole stockholder, appeal following the district court's entry of judgment in favor of Jim Walter Resources, Inc. ("JWR"). The court granted summary judgment for JWR on its breach of contract claim against WCM. The judgment also provided that JWR may levy execution on certain of Chamblee's assets in accordance with the default judgment entered against Chamblee on JWR's Alabama Fraudulent Transfer Act ("AFTA") claim.[1] JWR cross appeals, contending that the district court erred in refusing to enter a money judgment against Chamblee on JWR's AFTA claim.

Jurisdiction Under 28 U.S.C. § 1291

As a threshold matter, we must address WCM's and Chamblee's contention that the judgment entered on

[1]WCM and Chamblee present issues on this appeal relative to several other orders and rulings of the district court. They argue that the district court erred in (1) entering a default judgment for JWR on its AFTA claim; (2) granting summary judgment for JWR on WCM's tortious interference counterclaim; (3) dismissing the remainder of WCM's and Chamblee's counterclaims; (4) ruling that the affidavits of Keith Frazer and Hal Frazer revealed communications protected by JWR's attorney-client privilege, striking the affidavits, and enjoining WCM from further using the material; and (5) refusing to grant WCM and Chamblee a protective order.

June 29, 1994 (the "June 29 Order"), is not a final judgment appealable under 28 U.S.C. § 1291.[2] They argue that the June 29 Order is not final because JWR sought but did not receive a money judgment against Chamblee under the AFTA. They liken this outcome to a case in which a court has determined liability but has yet to determine damages. JWR responds that the June 29 Order is final because the district court resolved all claims before it, notwithstanding JWR's disagreement with the court's resolution of the AFTA claim.

We hold that the June 29 Order is a final judgment appealable under 28 U.S.C. § 1291. The district court completely adjudicated the claims of all parties, including JWR's AFTA claim. Contrary to WCM's contention, the court did resolve JWR's claim for a money judgment. The court simply declined to enter a money judgment,[3] ordering instead that JWR may levy on any assets which were the subject of the AFTA claim. While this may not have been the appropriate remedy under the AFTA, this order completely adjudicated JWR's claim and is a final judgment.

[2]WCM and Chamblee argue that the orders that they seek to appeal are nevertheless appealable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221 (1949). Because we hold that the June 29 Order is a final judgment, we do not address this argument.

[3]In its written ruling on JWR's motion to alter or amend the June 29 Order to grant a money judgment, the court stated that it did "not view such relief as appropriate in the context and posture of the given case." (R. 4-118-2). The court continued that it did "not intend to reopen this litigation or receive additional evidence to alter the judgment entered in this much-litigated case." (*Id.*) Thus, the district court clearly granted all relief that it deemed appropriate and was finished with the case.

The Merits

WCM's and Chamblee's arguments in the direct appeal are without merit and do not warrant further discussion. *See* 11th Cir. R. 36-1.

In the cross-appeal, JWR argues that the district court erred in refusing to enter judgment against Chamblee for a definite sum on JWR's AFTA claim.[4] The default judgment states that all transfers from WCM to Chamblee after the first sale of coal were fraudulent as to JWR under the AFTA. The June 29 Order allows JWR to levy execution on any assets which were the subject of these fraudulent transfers. JWR moved for the court to amend the June 29 Order and enter judgment against Chamblee for either $1,074,714.23, the amount of the judgment against WCM, or $444,645.58, the sum of the transfers from WCM to Chamblee that JWR was able to identify through discovery. The court refused to enter a money judgment against Chamblee. Instead, the court suggested that JWR institute a separate action for a money judgment under the AFTA relying upon the findings, declarations, and judgments in this action.

The AFTA lists the remedies available to a creditor seeking recovery for a fraudulent transfer. *See* Ala. Code 8-9A-7 (1975). A creditor that has obtained a judgment on a claim against the debtor may levy execution on the asset transferred or its proceeds, if the court so orders. Ala. Code § 8-9A-7(b) (1975). Here, JWR obtained a judgment on its claim against WCM, and the district court ordered that JWR may levy execution on the assets transferred from WCM to Chamblee or their proceeds. Thus, the district court granted one of the several remedies available under the AFTA.

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[4]Chamblee does not respond to this argument.

Nevertheless, JWR argues that the court should have entered a money judgment against Chamblee. JWR relies on Ala. Code § 8-9A-8(b)(1). That section provides that

> to the extent a transfer is voidable in an action by a creditor under Section 8-9A-7(a)(1), the creditor may recover judgment for the value of the asset transferred ... or the amount necessary to satisfy the creditor's claim, whichever is less, or judgment for conveyance of the asset transferred.

Ala. Code 8-9A-8(b)(1) (1975). Under this section, the district court had the authority to enter a money judgment. *See also Profeta v. Lombardo,* 600 N.E.2d 360, 363 (Ohio Ct. App. 1991) (under Uniform Fraudulent Transfer Act, court has discretion to enter money judgment against transferee); *Park Hill Corp. v. Sharp,* 803 P.2d 326, 328 (Wash. Ct. App. 1991) (under Uniform Fraudulent Transfer Act, defrauded creditor is entitled to money judgment against transferee if equitable principles compel such relief). The question, therefore, is whether the court erred in declining to grant this remedy.

We hold that the district court erred in failing to enter judgment against Chamblee for a definite sum. While the remedy awarded—an order that JWR may levy execution on the assets transferred to Chamblee—generally is an appropriate remedy under the AFTA, it is an inadequate remedy in the circumstances of this case. If WCM had transferred real property or certain other types of property to Chamblee, JWR would be able to levy execution on the assets transferred. But the fraudulent transfers in this case consisted of cash in an amount that has yet to be determined. Because it is impossible to levy execution on an unspecified sum of cash that has been mingled with other assets, JWR is left without a remedy. *See Price v. Hawkins,* 439 S.E.2d 382, 385 (Va. 1994) (when cash is

fraudulently transferred, creditor is without effective remedy unless personal money judgment is entered against transferee). To avoid this inequitable result, the district court should have entered a money judgment against Chamblee for the lesser of the value of the fraudulent transfers or the amount of JWR's claim against WCM. *See* Ala. Code § 8-9A-8(b)(1).

That part of the judgment granting relief against Derrell Chamblee is vacated to permit the district court to enter a judgment against Chamblee on the AFTA claim consistent with this opinion.

AFFIRMED IN PART; VACATED IN PART; and REMANDED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JIM WALTER RESOURCES, INC.,	)	
PLAINTIFF,	)	
VS.	)	CV-91-H-1619-S
W. C. MANAGEMENT, INC.	)	
DEFENDANT.	)	

ORDER

The court has before it the July 8, 1994 motion to alter or amend judgment filed by plaintiff Jim Walter Resources, Inc. ("Jim Walter"). The motion addresses the court's June 29, 1994 order granting final judgment in the above-styled case, which order granted summary judgment in favor of Jim Walter and against defendant W. C. Management, Inc. "WCM") in the amount of $1,074,714.232. In addition, the order states:

> . . . in accordance with the default judgment entered April 12, 1994 against Derrell Chamblee, it is ORDERED, ADJUDGED and DECREED that plaintiff may levy execution on any assets (or proceeds thereof) which are the subject of the transfers described in the April 12, 1994 default judgment.

Plaintiff seeks to have the above-described judgment amended, pursuant to Fed.R.Civ.P. 59, "to state a judgment in a sum certain against [Derrell] Chamblee." Plaintiff maintains that the amount of said judgment should be the $1,074,714.23 entered as judgment against WCM, or, alternatively, $444,645.58, which plaintiff de-

scribes as "the sum of the transfers from WCM to Chamblee that Jim Walter has thus far been able to identify from the limited discovery." Plaintiff has attached to its motion copies of checks reflecting transfers from WCM to Chamblee subsequent to the first sale of coal under the contracts at issue in this litigation.

It may be the case, as plaintiffs points out, that the Alabama Fraudulent Transfer Act (specifically, Section 8-9A-8(b)(1)), allows a creditor to recover a judgment against a transferee for the value of an asset transferred when such transfer is voidable as fraudulent under the Act. However, the court does not now view such relief as appropriate in the context and posture of the given case.

The court is of the opinion that plaintiff may institute a separate action under the Alabama Fraudulent Transfer Act in order to obtain the judgment it seeks, and in doing so it may rely upon findings and declarations made and judgments entered in this action. The court, however, does not intend to reopen this litigation or receive additional evidence to alter the judgment entered in this much-litigated case.

Accordingly, plaintiff's motion to alter or amend the June 29, 1994 judgment is OVERRULED without prejudice to plaintiff to file a separate action under the Alabama Fraudulent Transfer Act or to take other appropriate action to recover assets (or the proceeds thereof) which are the subject of the transfers described in the April 12, 1994 default judgment entered herein against defendant Chamblee.

DONE this 20th day of July, 1994.

/s/ James H. Hancock
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JIM WALTER RESOURCES, INC.,	)	
PLAINTIFF,	)	
VS.	)	CV-91-H-1619-S
W. C. MANAGEMENT, INC.	)	
and		
DERRELL CHAMBLEE	)	
DEFENDANT.	)	

ORDER GRANTING FINAL JUDGMENT

In accordance with the memorandum of opinion this day entered, it is ORDERED, ADJUDGED and DECREED that the motion for summary judgment filed by plaintiff Jim Walter Resources, Inc. is GRANTED, and judgment in favor of said plaintiff and against defendant W. C. Management, Inc. in the amount of $1,074,714.23 is hereby ENTERED.

Further, in accordance with the default judgment entered April 12, 1994 against Derrell Chamblee, it is ORDERED, ADJUDGED and DECREED That plaintiff may levy execution on any assets (or proceeds Thereof) which are the subject of the transfers described in the April 12, 1994 default judgment.

DONE this 29th day of June, 1994.

/s/ James H. Hancock
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JIM WALTER RESOURCES, INC.,	)	
PLAINTIFF,	)	
vs.	)	CV-91-H-1619-S
W. C. MANAGEMENT, INC.,	)	
and		
DERRELL CHAMBLEE,	)	
DEFENDANT.	)	

MEMORANDUM OF OPINION

The court has before it the March 22, 1994 motion for summary judgment filed by Jim Walter Resources, Inc. ("Jim Walter"), plaintiff in the above case. Pursuant to the court's order of March 22, 1994, the motion was deemed submitted for decision, without oral argument, as of April 19, 1994, based on evidence filed and briefs submitted by the parties.[1]

Under Fed.R.Civ.P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986). The party asking for summary judgment the basis for its motion, and must identify those portions of the

[1]On March 31, 1994, the defendants, W. C. Management and Derrell Chamblee, filed a cross motion for summary judgment seeking a declaration that plaintiff take nothing by its complaint. No submission order was entered as to this motion, and the resolution of plaintiff's motion in favor of the plaintiff renders defendants' motion MOOT.

pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing the nonmoving party has failed to present evidence in support of some element of his case on which he bears the ultimate burden of proof. *Id.* at 322-23; *see* Fed.R.Civ.P. 56(a) and (b).

The moving party has met his burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and by his own affidavits, or by the depositions, answers to interrogatories, and admissions of file, designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 322.

An issue of fact is "material" if it is a legal element of the claim, as identified by the substantive law governing the case, such that its presence or absence might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 202 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249.

In ruling on a prior motion for partial summary judgment filed by Jim Walter on March 10, 1993, the court found the following facts to be undisputed. Jim Walter

and WCM are both Alabama corporations, each having its principal place of business in Alabama. Derrell Chamblee is the sole stockholder of WCM. On or about December 14, 1990, Jim Walter and WCM entered into two contracts, each of which was entitled "Coal Sales Contract." The contracts provided that Jim Walter, as the seller, would invoice the coal shipped to WCM on a weekly basis, and that payment for said coal was due within thirty days of the invoice date.[2] The purchase price was specified as $17.00 per net ton, and the amount to be sold was 170,000 net tons. *See* Defendants' Evidentiary Submission filed March 31, 1994, Exhibit A.

The duration of each contract was to be from January 1, 1991 through December 31, 1991; however, the "review clause" contained in paragraph 7 provided as follows:

> The parties shall meet prior to May 1, 1991 to discuss Buyer's performance in taking tonnage, current market conditions, quality, price and availability of coal to determine whether or not to modify and/or continue this Contract. Failure of the Parties to reach mutual agreement on the foregoing by May 1, 1991 shall result in the termination of this Contract.

See Complaint, Ex. A, ¶ 7. The contracts were signed by Derrell Chamblee as president of WCM and by Robert Pollard, Assistant Vice President of Marketing for Jim Walter.

During the first several months of 1991, WCM purchased coal from Jim Walter, and defendant was invoiced for the amounts purchased. No payment was received,

[2]Notwithstanding the language of the contracts, WCM maintains that by subsequent oral agreement, and by practice and performance under the contracts, payment was not due until 90 to 180 days after the invoice date, depending upon the circumstances of the resale by WCM. *See* Answer, ¶ 5.

however, for over $900,000.00 worth of coal shipped to WCM. On May 10, 1991, a telecopier letter was sent from Jim Walter to WCM stating the following:

> Due to unforeseen circumstances we will not have any mids[3] available until further notification. I apologize for the inconvenience. If you have any questions, please call.

See Defendants' Evidentiary Submission, Exhibit E. On June 3, 1991, counsel for WCM sent a letter to Robert Pollard in which he claimed that Jim Walter had breached the sales contracts; he further stated that he planned to file suit against Jim Walter unless performance under the contracts was resumed within ten days. *See* Evidentiary Submission of WCM, Ex. B.

On June 5, 1991, Harold Rice, Senior Attorney for Jim Walter, responded to the June 3rd letter by correspondence stating, in pertinent part:

> I call your attention to Paragraph Seven of the Coal Sales Contract which terminates this contract effective May 1, 1991. This has been clearly conveyed to your client by JWR management. You may want to further consider that JWR is currently in Chapter 11 Bankruptcy Reorganization and any litigation against JWR would be stayed indefinitely as well as having the effect of hampering the possibility of future business relationships with your client.

See Evidentiary Submission of WCM, Ex. C.

[3]"Mids" refers to "middlings," a term used to describe a grade of bituminous coal sold by Jim Walter. According to Keith Frazer, middlings is a "secondary" product which is ". . . too good to throw away to refuse and the proceeding of the coal, the cleansing of the impurities from the coal, and it's not good enough to put in the prime product, so, thereafter, it's a middle material, it's middlings." *See* Frazer depo., pp. 15-17.

On July 16, 1991, Jim Walter filed its complaint initiating the above action.[4] The complaint alleges that WCM has failed to pay some $904,775.80 for coal sold and delivered to WCM under the contracts at issue.[5] WCM thereafter filed its answer in which it admitted executing the contracts at issue and admitted that it had purchased coal from Jim Walter pursuant to said contracts but denied that any money was owed because Jim Walter "breached the said contracts before payment for the said coal was due and the damages caused to the defendant by the breach of said contracts by the plaintiff are greater than any amount which the defendant would owe to plaintiff for any coal purchased. . . ."

The answer of WCM also incorporated a counterclaim; count one set forth a claim for breach of contract, while count two contained a claim for tortious interference with the business relationships of WCM.[6] On March 10, 1993, Jim Walter filed a motion for partial summary judgment with respect to the tortious interference claim asserted by WCM, which the court granted by order entered on April 2, 1993. The court thereafter denied WCM's motion to reconsider the April 2, 1993 summary judgment order.

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[4]Subject matter jurisdiction was invoked under 28 U.S.C. § 1334 (b) by virtue of the fact that Jim Walter is a debtor in possession in a Chapter Eleven bankruptcy proceeding.

[5]Subsequent to the pretrial conference held on January 28, 1993, Jim Walter amended its complaint adding Derrell Chamblee as a defendant and asserting against him a claim under the Alabama Fraudulent Transfer Act.

[6]WCM's breach of contract claim was based on the allegation that Jim Walter, in the middle of its performance of the contracts at issue, sold the coal it had agreed to sell to WCM to others at a substantially higher price. Jim Walter denies that it breached the contracts and maintains that they terminated pursuant to paragraph seven of each document.

In May of 1993 Jim Walter filed interrogatories and requests for production seeking to discover information relevant to the remaining counterclaims (i.e. the tortious interference claim asserted by Chamblee and the breach of contract claim asserted by WCM). The interrogatories asked Chamblee, among other things, to identify those business relationships which he claims were subject to the alleged interference. The request for production sought documents relevant to Chamblee's and WCM's claims, including tax returns and other financial documents. Jim Walter also noticed the Rule 30(b)(5) deposition of Robert W. Bennett, the document custodian of WCM and other Chamblee-controlled companies, seeking documents relevant to the claims asserted by WCM and Chamblee.

Bennett appeared for this deposition but did not bring with him any of the documents requested in the deposition notice. Bennett failed to produce the documents notwithstanding his testimony (a) that he is the record custodian for WCM and certain of Chamblee's other companies; (b) that the documents in question were within his custody and control; and (c) that the totality of the business records in question would fill no more than several boxes. On June 22, 1993, Jim Walter filed a motion to compel seeking the production of the documents requested in the Bennett deposition.

On June 29, 1993, Jim Walter filed a motion to compel with regard to its interrogatories and requests for production, pointing out that Chamblee's interrogatory responses failed to identify the business relationships he contended had been interfered with by Jim Walter and the other counterclaim defendants, and that Chamblee's response to the request for production was for the most part a complete refusal to produce the documents requested.

These motions to compel were supported by a legal memorandum and came on for hearing at the court's August 6, 1993 motion docket. On August 9, 1993, the court entered an order granting Jim Walter's motions to compel. The order required Chamblee and WCM to answer the subject interrogatories and respond to the requests for production by August 29, 1993.

Chamblee and WCM thereafter filed a petition for writ of mandamus in the Eleventh Circuit Court of Appeals. On August 30, 1993, the Eleventh Circuit denied the petition for writ of mandamus. WCM and Chamblee then filed a notice of appeal seeking appellate review of the court's August 9, 1993 order on the motions to compel as well as the court's order denying the motion to disqualify counsel for WCM and Chamblee. On September 10, 1993, WCM and Chamblee filed a motion with this court to stay the court's orders pending appeal, which motion the court denied. The appeal was then dismissed by the Eleventh Circuit for lack of jurisdiction.

Thereafter, counsel for Jim Walter and other counterclaim defendants made demands upon counsel for WCM and Chamblee to respond to the discovery that was the subject of the court's August 9, 1993 order. Based on the lack of response by WCM and Chamblee, Jim Walter and the other counterclaim defendants than filed a motion to dismiss the counterclaims of Chamblee and WCM, which the court granted on December 29, 1993. The order entered by the court provides in pertinent part:

> Given the repeated refusal by WCM and Chamblee to comply with the court's August 9, 1993 order, the court hereby GRANTS the motion of Jim Walter, Carr, Sims, Rice and Pollard to dismiss the counterclaims of Chamblee and WCM, and such counterclaims are DISMISSED. Such dismissal, however, is without prejudice to Chamblee and WCM to petition the court to set

> aside the dismissal. Any such petition, however, must be filed no later than January 19, 1994 and must have attached thereto a certification by Chamblee, individually, by Robert W. Bennett, by WCM and by counsel for counterclaimants that as of January 14, 1994, they have delivered to the offices of counsel for Jim Walter (1) all documents which were the subject of the Rule 30(b)(5) deposition of Bennett; (2) full, complete and properly executed answers to each interrogatory; (3) each and every item or document which is the subject of the request for production and which item or document was in the possession, custody or control of either counterclaimant as of May 26, 1993, or has been in either counterclaimant's possession, custody or control since such date.

Order of December 29, 1993. WCM and Chamblee
l not comply with the terms of the above order; in-
ad, on January 10, 1994, they filed a motion to amend
: judgment pursuant to Fed.R.Civ.P. 59(e). The mo-
n specifically sought to have the court amend its judg-
nt by certifying it as final pursuant to Rule 54(b). On
uary 18, 1994, the court denied the motion to alter or
end, and on January 22, 1994, WCM and Chamblee
d yet another notice of appeal. Jim Walter and the
ıer counterclaim defendants filed a motion to dismiss
: appeal, which motion is currently pending before the
venth Circuit.

On March 18, 1994, Jim Walter filed a motion for de-
lt judgment against defendant Chamblee on Count
e of its complaint (which count sets forth a claim
ainst Chamblee under the Alabama Fraudulent Trans-
Act, *Alabama Code* § 8-9A-1, *et seq.*). As grounds for this
otion, Jim Walter provided evidence showing that
amblee had made certain transfers from WCM's ac-
ınts to himself or his other companies. Jim Walter ar-

gued that the discovery it had requested and which WCM and Chamblee did not produce is directly relevant to its claim against Chamblee under the Alabama Fraudulent Transfer Act, and that the refusal by WCM and Chamblee to respond to discovery, notwithstanding the court's orders to do so, precluded it from investigating WCM's finances to determine whether additional fraudulent transfers have been made. Jim Walter argued that under these circumstances it was entitled to default judgment against Chamblee and that the amount of said judgment should be the same as whatever judgment is entered against WCM pursuant to Jim Walter's pending motion for summary judgment.

On March 21, 1994, the court entered an order expressing its intent to grant the motion for default unless good cause to the contrary was shown by defendants in writing by April 11, 1994. The order expressly stated that any showing by defendants must include the filing of an affidavit by Chamblee and the filing of a certification by each attorney of record to the effect that all records and documents made the subject of the court's earlier August 9, 1993 order, which document or records had at any time since May 27, 1993 been in the possession of Chamblee or WCM or Robert Bennett, had been delivered to the office of counsel for plaintiff for inspection and copying.[7]

On April 11, 1994, defendants filed their response to the show cause order, together with a motion to reconsider, stating that they had "substantially complied" with

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[7]This order was amended on April 1, 1994 to include documents and records described in the first request for production of documents to Chamblee (Exhibit A to the March 25, 1994 response of Jim Walter), including but not limited to those described in paragraphs 7, 8, 11, 12, 14 and 15 thereof, which at any time from May 24, 1993 to date have been in the actual or constructive possession, custody or control of Chamblee.

the court's August 9, 1993 order. However, as noted by the court in its April 12, 1994 order, defendants failed to supply the mandated certifications of either Wiggins or Ebbinghouse, attorneys of record for defendants, nor did they supply the requisite affidavit of Chamblee. Citing intentional and repeated abuse of discovery and failure to comply with court orders, the court overruled the motion to reconsider, granted the motion for default judgment, and such judgment was entered against Chamblee.

Thus the only claims now remaining in the action are those for breach of contract by Jim Walter against WCM. In support of its pending motion for summary judgment, Jim Walter has filed the Affidavit of Robert Pollard, to which are attached copies of the two coal sale contracts entered into between Jim Walter and WCM on December 14, 1990, and copies of invoices from Jim Walter to WCM for cold sold and delivered to WCM under these contracts. Jim Walter argues that the evidence is undisputed that during late 1990 and the first several months of 1991, WCM purchased coal from Jim Walter under both coal sale contracts and took delivery of said coal. Jim Walter further argues that the evidence is undisputed that WCM was invoiced for the coal sold and delivered but that it has failed to pay for $910,774.91 of such coal. *See* Pollard affidavit. Jim Walter contends that as a matter of law it is entitled to a judgment against WCM in the amount of $910,774.91, plus pre-judgment interest at a rate of 6% from July 4, 1991.[8]

In response to Jim Walter's motion for summary judgment, WCM has submitted a brief; in addition, on March 31, 1994, the defendants filed an evidentiary submission

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[8]The last invoice is dated June 4, 1991, and the amount of that invoice was due thirty days thereafter. *See* Affidavit of Robert Pollard, ¶ 2, Ex. 2.

in support of their motion for summary judgment and in opposition to the one filed by Jim Walter.[9]

WCM argues that Jim Walter is not entitled to summary judgment on its breach of contract claim because Jim Walter itself breached the contract at issue and the damages incurred by WCM were greater than the money owed under the Contract. Specifically WCM argues that Jim Walter breached the contract because paragraph 7 was satisfied by the December 21, 1990 sales order between the parties. Defendant further maintains that a meeting was held in mid-April between Jim Walter and WCM which authorized the parties to proceed and which met the requirements of the above-referenced paragraph 7. In the alternative, defendant argues that even if neither of these events satisfied paragraph 7, Jim Walter

[9]The evidentiary submission by defendants consists of the following:

1. Coal sales contract dated December 14, 1990.
2. Jim Walter sales order dated December 21, 1990.
3. Jim Walter memorandum from J. W. Sims dated May 10, 1991.
4. Letter from attorney Rutledge to Robert W. Pollard dated June 3, 1991.
5. Letter from Harold Rice, senior attorney, dated June 5, 1991.
6. Letter from Rutledge to Rice dated June 10, 1991.
7. Middlings purchases by WCM from Jim Walter for the years 1990 to 1991.
8. Jim Walter Resources telecopier cover letter dated May 10, 1991.
9. Various bills of lading, sales orders and invoices reflecting shipments of coal to WCM during the period April 1991 through June 1991.
10. Excerpts from the depositions of James Milford Sims, Keith Frazer, Derrell Chamblee and Robert W. Pollard.

See Evidentiary Submission by WCM and Chamblee filed March 31, 1994.

waived the requirements of that contract provision by selling some 6,000 tons of middlings to WCM after the May 1, 1991 date.

In response to these arguments, plaintiff maintains that the court's dismissal of WCM's counterclaim (for breach of contract) precludes it from raising any alleged breach of contract by Jim Walter as a defense to the pending motion for summary judgment. Plaintiff points out that during discovery it sought documents relevant both to WCM's claims that the contracts had been breached and to WCM's alleged damages flowing therefrom. WCM did not produce such documents, and its refusal to do so, in face of the court's order granting plaintiff's motion to compel, resulted in the dismissal (now with prejudice, given defendants failure to comply with the directives of the court's December 29, 1993 order) of the breach of contract claim asserted by WCM, as well as the tortious interference claim asserted by Chamblee.

According to Jim Walter, the issue of whether it breached the sales contracts with WCM and whether WCM was damaged thereby was "laid to rest" with the court's dismissal of WCM's counterclaim, and to allow WCM to raise the alleged breach of contract as a defense to Jim Walter's claims would "reward WCM for its repeated refusal to comply with this Court's discovery orders." *See* Brief of Plaintiff in Support of its Motion for Summary Judgment, dated April 5, 1994, p. 3.

While it is arguable whether a dismissal with prejudice would bar, on grounds of claim preclusion, the affirmative defense that Jim Walter breached the contracts at issue (given the court's refusal to certify as final its order dismissing WCM's counterclaim), the court finds that defendants' well-documented discovery abuses and refusal to comply with court orders precludes WCM from now defending a motion for summary judgment based on an

affirmative defense which is in substance the same as a counterclaim previously dismissed as a sanction for such abuses. To hold otherwise would reward WCM for its already-sanctioned conduct.

This being the case, Jim Walter is entitled to judgment on its breach of contract claim. The evidence is undisputed that the parties entered into two contracts for the sale of coal, that coal was sold and delivered to WCM under the contracts, and that Jim Walter was never paid for said coal. The affidavit of Robert Pollard and the invoices attached thereto show that the money owed for the coal delivered to WCM amounts to $910,774.91. The evidence further shows that the last invoice for the coal delivered was dated June 4, 1991, and that payment for the coal was due thirty days from that date.

Accordingly, Jim Walter is entitled to judgment against WCM in the amount of $910,774.91, plus prejudgment interest in the amount of 6% dating from July 4, 1991, for a total judgment of $1,074,714.23. A separate order in accordance with this memorandum of opinion will be entered.

DONE this 29th day of June, 1994.

/s/ James H. Hancock
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JIM WALTER RESOURCES, INC.,	)	
PLAINTIFF,	)	
VS.	)	CV-91-H-1619-S
W. C. MANAGEMENT, INC.,	)	
DEFENDANT.	)	

ORDER

The court had before it the June 22, 1993 motion to compel filed by counterclaim defendant Jim Walter Resources, Inc. ("JWR"), together with the June 29, 1993 motion to compel also filed by JWR. Both motions came on for hearing at the court's regularly scheduled motion docket held on August 6, 1993 in Birmingham, Alabama.

The June 22, 1993 motion to compel deals with documents requested in the May 27, 1993 deposition notice of Robert W. Bennett.[1] Counsel for W. C. Management, Inc. ("WCM") and Derrell Chamblee filed an objection to the deposition and to the production of the documents requested, arguing that the documents requested are not clearly identified, that they cover periods of time unrelated to this litigation, that they embrace attorney-client communications and proprietary business information,

[1]The deposition notice makes reference to Bennett as a Rule 30(b) deponent. *See* June 22, 1993 motion to compel, Ex. A. By letter dated June 14, 1993, counsel for JWR made clear that he intended to depose Bennett as the records custodian for the companies in which Derrell Chamblee had an interest, pointing out that Bennett had previously filed an affidavit identifying himself as the records custodian for these corporations. Id., Ex. B. Apparently Bennett did appear and testify at the scheduled deposition but did not produce the requested documents.

that no showing of need had been made so as to justify the production of the requested tax returns, and that Bennett, as records custodian for Chamblee's corporations, cannot be compelled to produce his personal records.

The interrogatories and document requests which form the basis of the second motion to compel are similar in substance to the document request served on Bennett.[2] In general they seek information and documentation regarding Chamblee and his various business interests, the businesses and contracts which he claims have been damaged by the conduct of JWR, the extent of the damages he claims to have suffered, and specifics regarding allegations made by him in his counterclaim against JWR.

JWR argues that the information sought is relevant to its fraudulent conveyance claim against Chamblee and to its defense of Chamblee's counterclaim for tortious interference. It maintains that it cannot proceed with the preparation of its case or defense in that it cannot depose Chamblee without the requested documents, nor can it prepare its experts.

The court cannot understand how counsel for Chamblee and WCM can argue that the information sought in the above-described discovery requests is irrelevant to the pending action. Chamblee has filed a counterclaim making broad allegations of tortious interference by JWR with WCM and other businesses in which Chamblee had an interest. In light of such allegations, information concerning Chamblee's business, his alleged

[2]The evidentiary filing by JWR shows that on or about May 26, 1993, JWR served on Chamblee interrogatories and requests for production. On or about June 25, 1993, Chamblee filed responses and objections maintaining, among other things, that the requests were overbroad, unclear and constituted an invasion of his privacy.

damages, and the facts constituting the purported tortious conduct would certainly be relevant and discoverable. Moreover, the court does not find the requests to be overbroad or unduly burdensome in terms of time. For the most part the requests are limited to the times identified by counsel for WCM and Chamblee as relevant to the litigation. Furthermore, counsel for JWR points out that Bennett testified, with regard to the documents he was asked to produce, that the totality of these documents would comprise no more than several boxes.

As for the argument that some of the documents sought may contain proprietary business information, JWR has, as is required by the law, established the need for and relevance of such information.[3] The same can be said for the tax returns requested. Finally, the fact that Bennett is custodian for Chamblee's businesses is academic, in that these requests have now been made on Chamblee personally, and whoever has control of the requested information is under an obligation to produce, whether that person be Bennett or Chamblee, or both Bennett and Chamblee.

The only legitimate objection the court finds is that based on the possibility that certain documents might contain privileged attorney-client information. While documents embracing such information would not be discoverable, WCM and Chamblee are reminded that they shoulder the burden of establishing the asserted privilege, and thus any document they withhold on this basis must be identified to JWR and to the court and the grounds for the privilege set forth in writing.

[3]At the motion docket counsel for WCM and Chamblee asserted, for the first time, the need for a protective order should the motions to compel be granted. The court, however, has received no evidence supporting the need for such an order, and arguments based on generalities will not suffice.

Accordingly, the motions to compel are GRANTED and defendants/counterclaim plaintiff are hereby ORDERED to answer the interrogatories and respond to the requests for production described above, albeit with the limitation identified in the foregoing paragraph, within twenty days from the entry of this order.

DONE this 9th day of August, 1993.

/s/ James H. Hancock
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JIM WALTER RESOURCES, INC.,	)	
PLAINTIFF,	)	
VS.	)	CV-91-H-1619-S
W. C. MANAGEMENT, INC.	)	
DEFENDANT.	)	

ORDER

The court has before it the July 12, 1993 motion to disqualify counsel and for other relief filed by Jim Walter Resource, Inc. ("JWR"). The motion came on for hearing at the court's regularly scheduled motion docket held in Birmingham, Alabama on Friday, August 6, 1993. Prior to the hearing briefs were received on July 13, 1993 (for plaintiff), on July 20, 1993 (for defendants), and on July 30, 1993 (for plaintiff).

Based on the pleadings and evidence of record,[1] the court finds the facts relevant to the motion to be as follows:

[1]In support of its motion, JWR filed as exhibits 1) the Notice of Filing Affidavits of Keith Frazer and Hal Frazer in Opposition to Jim Walter Resources' Motion for Summary Judgment, together with copies of the affidavits; 2) the affidavit of Harold D. Rice; 3) excerpts from the depositions of Hal Frazer, Keith Frazer and Harold Rice; and 4) a June 21, 1993 letter of resignation from Hal Frazer to the President of United Land Corporation. On July 20, 1993, defendants, in opposition to the motion, filed the affidavits of Richard J. Ebbinghouse and Derrell J. Chamblee.

On or about June 21, 1993, counsel for W. C. Management, Inc. (hereinafter referred to as "WCM") filed the affidavits of Keith Frazer and Hal Frazer in opposition to JWR's motion for partial summary judgment. Keith Frazer is a former officer of JWR having held the position of Vice President of Marketing and Transportation until his retirement in November of 1992. *See* K. Frazer depo, p. 8. Keith Frazer was one of the JWR employees directly involved in the events underlying this litigation.

Hal Frazer, who is Keith Frazer's son, is a former officer of United Land Corporation who held the position of Vice President and General Manager. *See* H. Frazer depo., p. 15. Hal Frazer resigned from this position effective June 21, 1993 at 8:00 a.m., the same day on which , the affidavits at issue were filed. Hal Frazer was also manager of the Land Division of JWR. Like JWR, United Land Corporation is a subsidiary of Walter Industries, Inc. and thus is one of JWR's sister corporations. All subsidiaries of Walter Industries, Inc. located in Alabama are represented by a single in-house legal staff that includes Joseph Spransy, Corporate Counsel for each of these subsidiaries, and counterclaim defendant Harold Rice, Assistant Corporate Counsel. At all relevant times Spransy and Rice have represented JWR, United Land and the individual counterclaim defendants in connection with this litigation. In addition, the Birmingham, Alabama law firm of Bradley, Arant, Rose & White has served as outside counsel for these persons and entities. *See* Hal Frazer depo., p. 14; *see also* Rice affidavit.

The affidavit of Keith Frazer reflects that he was deposed in this case on August 25, 1992, and in the affidavit he states that he has since retired and now seeks "to give a more complete statement relative to the subject case." He makes reference to a meeting he attended in June or July of 1991 in the office of William Carr, president of JWR. Present at the meeting were Carr, Keith Frazer,

Rice and Bob Pollard, an assistant vice president of JWR. According to Keith Frazer, the subject of the meeting was the dispute between WCM and JWR over the contract to sell coal to WCM during 1991, which dispute led to the filing of the instant litigation on July 16, 1991, shortly after the meeting. Keith Frazer then proceeds to relate in his affidavit statements made by Carr during the meeting; he describes what he refers to as "the official company policy" of JWR regarding its relationship with Chamblee; and he discloses instructions he received from one of the Bradley, Arant attorneys. Throughout the affidavit Keith Frazer offers his theories as to why the communications he is revealing are not protected by the attorney-client privilege (i.e. "it was not an attorney-client meeting as Mr. Rice was not asked for any advice or consulted in any way" and "there was clearly no attorney-client consultation involved since Mr. Carr was issuing orders, not seeking legal advice").

In his affidavit, Hal Frazer states that he wishes to "provide some background of the events prior to [his] deposition" and to make certain corrections to this deposition. He then relates instructions given to him prior to the deposition by Philip Carroll, one of the attorneys with Bradley, Arant. He further discloses statements made to him by Rice in September of 1992. Hal Frazer maintains that these communications are not protected by the attorney-client privilege because he did not solicit this visit" and "did not have any understanding that [he] was receiving legal advice." According to Hal Frazer, his "understanding" was that Rice "was in [his] office as an employee of Jim Walter Resources solely for the purpose of telling [him] not to do business with Derrell Chamblee or any of his companies." Hal Frazer also includes in his affidavit statements made during a meeting held in April of 1993 in JWR's offices. Present at the meeting were Carr, Rice, Spransy, Pollard, James Sims (a senior vice

president of JWR), William Temple (Frazer's boss and the President of United Land), Carroll and John Morrow, another attorney with the firm of Bradley, Arant. Hal Frazer maintains that these statements are not protected by the attorney-client privilege because 1) he was not at this meeting to request or receive legal advice, nor did he request or receive such advice; and 2) he did not understand that he was asked to attend the meeting in order to prepare for any proceeding related to this case.

In his affidavit, Richard J. Ebbinghouse, counsel of record for WCM and Chamblee, states that he has never seen, had any contact or conversation with, or corresponded with Keith Frazer, and that his contact with Hal Frazer was limited to his deposition, at which time Hal Frazer was represented by counsel. Ebbinghouse states that no other attorney or employee working with his law firm has contacted either Keith or Hal Frazer, other than to notify Hal Frazer of a rescheduled deposition.

Derrell Chamblee relates in his affidavit that he has been friends for years with Hal and Keith Frazer, that they voluntarily disclosed to him the information contained in their affidavits and agreed to put such information in affidavit form, and that he told his attorney about these disclosures and had the attorney prepare the necessary affidavits, which were subsequently signed and filed in this proceeding.

At the motion docket counsel for JWR made clear that the conduct by defense counsel of which he complains is defense counsel's filing into evidence communications he knew JWR claimed to be protected by the attorney-client privilege. According to JWR, defendants' attorney inquired about these communications during various depositions, at which time JWR raised objections based on the attorney-client privilege. JWR maintains that defendants' attorney, on notice that the privilege had been asserted, and knowing facts sufficient to put him on notice that JWR had a legitimate basis on which to at least assert the privilege, should have stopped Chamblee from disclosing to him the contents of the purportedly privileged discussions and should have filed a motion to compel or otherwise challenge the claim of privilege in court.

While defendants seek to characterize the communications as mere corporate meetings at which attorneys were only incidentally present, the evidence shows otherwise. For instance, the affidavit of Keith Frazer expressly states that the purpose of the meeting he describes was to discuss "the dispute between W.C. Management and Jim Walter Resources over the coal contract to sell W. C. Management 'middlings' during the year 1991." This "dispute" is the very heart of the controversy underlying the litigation which was commenced by JWR a short time after this meeting. Moreover, in his deposition Keith Frazer testified that he knew Rice, corporate counsel for JWR, was present at the described meeting because "the only time we discussed this situation would have come when Mr. Rice was present," and that Rice "would have been the one who kind of . . . instigated the conversation." *See* Depo. of K. Frazer, pp. 122-126.

Regarding the meeting which Keith Frazer describes, Rice states in his affidavit that he attended the meeting "to receive information from Jim Walter personnel and to provide legal advice with respect to the dispute with WCM, and in particular with regard to the litigation that Jim Walter was then, contemplating against WCM." According to Rice, "[t]hese meetings involved only Jim Walter personnel, and those present communicated freely with me and with each other with every expectation that these discussions were privileged and confidential."

Keith Frazer maintains that the discussions are not privileged because Rice, while present, "was not asked for

any advice or consulted in any way," and Carr "was issuing orders, not seeking any advice." Nonetheless, Keith Frazer admits that at the time he attended the meeting he was employed as a vice-president of JWR and that he knew the purpose of the meeting was to discuss the controversy over Chamblee's contract; furthermore, it is not Keith Frazer's subjective view of the meeting which controls and it is not his mistaken view that the attorney-client privilege only embraces communications being made while advice is being sought that determines the outcome of the claim of privilege.

The attorney-client privilege is both a rule of evidence (Fed.R.Evid. 501) and a limitation on discovery (Fed.R.Civ.P. 26(b)(1)); it also is implicated in a variety of ways in the rules which govern an attorney's professional conduct. The purpose of the attorney-client privilege is to promote complete and candid communication between clients and attorneys in order that attorneys may render informed, sound legal advice. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege is owned by the client, not the attorney, and it rests on the premise that if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be more reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. *Fisher v. United States*, 425 U.S. 391, 403 (1976).

The court is satisfied that June/July 1991 conversations in the office of the president of JWR described in the affidavit of Keith Frazer were clearly communications protected by the attorney-client privilege to the extent that they were not made for the purpose of committing a crime or tort. Similarly, the April 1993 conversations in the offices of JWR described in Hal Frazer's affidavit were clearly communications protected by the attorney-client

privilege to the extent they were not made for the purpose of committing a crime or tort. While it is not as clear, the court concludes that the September 1992 conversation between Hal Frazer and Rice referred to in Hal Frazer's affidavit also was a privileged communication. The privilege has not been waived[2] and has been strongly asserted by JWR. It is clear to the court that Keith Frazer and Hal Frazer deliberately and knowingly took action designed to damage JWR by disclosure to Derrell Chamblee of alleged statements and conversations which they knew were the subject of a claim by JWR of privilege. More importantly, the court concludes that Derrell Chamblee not only engaged in the same deliberate misconduct but also sought to gain an advantage in this lawsuit by his disclosure of the information to one or more of his attorneys who improperly took the information and sought to use it without first seeking a court determination on the validity of the claimed privilege. WCM and Chamblee should not be allowed to gain an advantage in this action by their misbehavior.[3] JWR's claim of privilege is SUSTAINED.

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[2] While even an inadvertent disclosure may waive the privilege, the activity out of which the disclosure occurs must have been engaged in within the general bounds of authorized corporate action. Thus, for example, should a thief steal a document from the corporate office which contains privileged information, there has been no waiver. Likewise, should a former disgruntled employee deliberately reveal privileged information to injure his former employer, there has been no waiver. In this case JWR has consistently and at every step sought to invoke the privilege.

[3] Defendants have argued that some of the statements are not covered by the privilege because they constitute a tort or were made for the purpose of committing a tort. Apart from the statements themselves, there is no evidence to support such an assertion. Moreover, defendants cannot be allowed to use the fruits of their own misbehavior to try and establish misbehavior by JWR.

Nonetheless, this misbehavior, coupled with the impropriety of counsel for defendants, is not justification for the disqualification of counsel. It is, however, additional justification for the court to sustain JWR's claim of privilege; thus, defendants and their counsel and any witness they may call at trial are hereby ORDERED to refrain from making any reference to the contents of the conversations earlier referred to in this order.

The motion to disqualify counsel is DENIED.

DONE this 12th day of August, 1993.

/s/ James H. Hancock
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JIM WALTER RESOURCES, INC.,	)	
PLAINTIFF,	)	
VS.	)	CV-91-H-1619-S
W. C. MANAGEMENT, INC.	)	
DEFENDANTS.	)	

ORDER

The court has before it the December 6, 1993 motion by counterclaim defendants Jim Walter Resources, Inc., William Carr, James Sims, Harold Rice and Robert Pollard to dismiss the counterclaims of Derrell Chamblee and W. C. Management, Inc.

As is reflected by the motion and by the pleadings of record, Jim Walter Resources, Inc. ("Jim Walter") brought this action on July 16, 1991 to collect money due for coal Jim Walter had delivered to W. C. Management, Inc. ("WCM"), but for which WCM had not paid. On October 2, 1991, WCM filed a counterclaim asserting claims of breach of contract and tortious interference with business relations. On February 16, 1993, Jim Walter amended its complaint to assert claims against Derrell Chamblee ("Chamblee"), who is WCM's sole stockholder, under the Alabama Fraudulent Transfer Act, *Alabama Code*, § 8-9A-1, *et seq.* Thereafter, Chamblee filed a counterclaim against Jim Walter, Sims, Rice, and Pollard, asserting claims of tortious interference with business relations. The court then set a new discovery cutoff date and reopened discovery on all claims.

Meanwhile, on March 10, 1993, Jim Walter had filed a motion for partial summary judgment with respect to the tortious interference claim asserted by WCM, which the court granted by order entered on April 2, 1993. Thereafter, WCM filed a motion to have the court reconsider its summary judgment order. On April 12, 1993, the court entered an order which, among other things, gave the parties the right to conduct additional discovery as to all claims and set a new submission date for Jim Walter's motion for partial summary judgment. The court received additional materials from the parties, and on August 9, 1993, it denied WCM's motion to reconsider. Thus, the only counterclaims remaining in this action are Chamblee's tortious interference claim and WCM's breach of contract claim.

In May of 1993 Jim Walter filed interrogatories and requests for production seeking to discover information relevant to the counterclaims being asserted by Chamblee and WCM. The interrogatories asked Chamblee, among other things, to identify those business relationships which he claims were subject to the alleged interference. The request for production seeks documents relevant to Chamblee's and WCM's claims, including tax returns, financial documents and other documents pertaining to the claims. Jim Walter also noticed the Rule 30(b)(5) deposition of Robert W. Bennett, the document custodian of WCM and other Chamblee-controlled companies, seeking documents relevant to the claims asserted by WCM and Chamblee.

Bennett appeared for his deposition but did not bring with him any of the documents requested in the deposition notice. Bennett failed to produce the documents notwithstanding his testimony (a) that he is the record custodian for WCM and certain of Chamblee's other companies; (b) that the documents in question were within his custody and control; and (c) that the totality of

the business records in question would fill no more than several boxes. On June 22, 1993, Jim Walter filed a motion to compel seeking the production of the documents requested in the Bennett deposition.

On June 29, 1993, Jim Walter filed a motion to compel with regard to its interrogatories and requests for production, pointing out that Chamblee's interrogatory responses fail to identify the business relationships he contends have been interfered with by Jim Walter and the other counterclaim defendants, and that Chamblee's response to the request for production was for the most part a complete refusal to produce the documents requested.

These motions to compel were supported by a legal memorandum and came on for hearing at the court's August 6, 1993 motion docket. On August 9, 1993, the court entered an order granting Jim Walter's motions to compel. The order required Chamblee and WCM to answer the subject interrogatories and respond to the requests for production by August 29, 1993.

Chamblee and WCM thereafter filed a petition for writ of mandamus in the Eleventh Circuit Court of Appeals. On August 30, 1993, the Eleventh Circuit denied the petition for writ of mandamus. WCM and Chamblee then filed a notice of appeal seeking appellate review of the court's August 9, 1993 order on the motions to compel as well as the court's order denying the motion to disqualify counsel for WCM and Chamblee. Jim Walter, Carr, Sims, Rice and Pollard have moved to dismiss the appeal, and that motion is pending before the Eleventh Circuit.

On August 31, 1993, WCM and Chamblee filed a motion to stay all proceedings pending the decision by the Eleventh Circuit on the interlocutory appeal. On September 7, 1993, the court denied the motion to stay. By letter dated September 10, 1993, counsel for Jim Walter made demands upon counsel for WCM and Chamblee to

respond to the discovery that is the subject of the court's August 9, 1993 order. To date, WCM and Chamblee have refused to provide any such discovery.

Quite clearly WCM and Chamblee have failed to timely comply with express directives from the court contained in its August 9, 1993 order. They have asked the court to stay all proceedings pending the resolution of the interlocutory appeal, which the court has refused to do. The court is unaware of any such stay issuing from the Eleventh Circuit Court of Appeals. It therefore appears to the court if WCM and Chamblee assume that the directives of the August 9, 1993 order are stayed, it is a stay of their own making, and not one imposed by any court.

Given the repeated refusal by WCM and Chamblee to comply with the court's August 9, 1993 order, the court hereby GRANTS the motion of Jim Walter, Carr, Sims, Rice and Pollard to dismiss the counterclaims of Chamblee and WCM, and such counterclaims are DISMISSED. Such dismissal, however, is without prejudice to Chamblee and WCM to petition the court to set aside the dismissal. Any such petition, however, must be filed no later than January 19, 1994 and must have attached thereto a certification by Chamblee, individually, by Robert W. Bennett, by WCM and by counsel for counterclaimants that as of January 14, 1994, they have delivered to the offices of counsel for Jim Walter (1) all documents which were the subject of the Rule 30(b)(5) deposition of Bennett; (2) full, complete and properly executed answers to each interrogatory; and (3) each and every item or document which is the subject of the request for production and which item or document was in the possession, custody or control of either counterclaimant as of May 26, 1993, or has been in either counterclaimant's possession, custody or control since such date. By their failure to comply with the court's August 9, 1993 order, counterclaimants have waived their right to object to any

such interrogatory or request for production, including an objection made on the basis of the attorney-client privilege which was permitted by the August 9, 1993 order.

DONE this 29th day of December, 1993.

/s/ James H. Hancock

UNITED STATES DISTRICT JUDGE

28 USCS § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

(June 25, 1948, ch 646, § 1, 62 Stat. 929; Oct. 31, 1951, ch 655, § 48, 65 Stat. 726; July 7, 1958, P. L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, P. L. 97-164, Title I, Part A, § 124, 96 Stat. 36.)

§ 1334. Bankruptcy cases and proceedings [See the Explanatory notes to this section; if § 113 of Act July 10, 1984, which amended § 402(b) of Act Nov. 6, 1978 (11 USCS prec. § 101 note), should prevail, the text and catchline of this section shall read as it appears here; another version of 28 USCS § 1334 follows this section]

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11 [11 USCS §§ 101 et seq.].

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 [11 USCS §§ 101 et seq.], or arising in or related to cases under title 11 [11 USCS §§ 101 et seq.].

(c) (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 [11 USCS §§ 101 et seq.] or arising in or related to a case under title 11 [11 USCS §§ 101 et seq.].

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 [11 USCS §§ 101 et seq.] but not arising under title 11 [11 USCS §§ 101 et seq.] or arising in a case under title 11 [11 USCS §§ 101 et seq.], with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by

appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code [11 USCS § 362], as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 [11 USCS §§ 101 et seq.] is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

(June 25, 1948, ch 646, § 1, 62 Stat. 931; July 10, 1984, P. L. 98-353, Title I, § 101(a), 98 Stat. 333.)

Rule 32. Use of Depositions in Court Proceedings

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any State and another action involving the same subject matter is afterward brought between the

same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Federal Rules of Evidence.

(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Form of Presentation. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

(d) Effect of Errors and Irregularities in Depositions.

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency, relevancy, or

materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if present ed at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

As amended Mar. 30, 1970, eff. July 1, 1970; Nov. 20, 1972, eff. July 1, 1975; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1937. eff. Aug. 1, 1987; Apr. 22, 1933, eff. Dec. 1, 1993.)

Rule 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions

(a) Motion For Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) ***Appropriate Court.*** An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) ***Motion.***

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the dis-

covery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) ***Expenses and Sanctions.***

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other

circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) ***Sanctions by Court in District Where Deposition is Taken.*** If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) ***Sanctions by Court in Which Action is Pending.*** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused

by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. [Effective Dec. 1, 1993.] If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that

the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discover sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

(e) [Abrogated]

(f) [Repealed. Pub.L. 96-481, Title II, § 205(a), Oct. 21, 1980, 94 Stat. 2330.]

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Pub.L 96-481, Title II, § 205(a), Oct. 21, 1980, 94 Stat. 2330; Mar 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

Unless the court in its order for dismissal otherwise specifies a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991).

Rule 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

(d) Costs; Attorneys' Fees.

(1) Costs Other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing

party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(2) Attorneys' Fees.

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a), and a judgment shall be set forth in a separate document as provided in Rule 58.

(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive

evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. § 1927.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Apr. 17, 1961, eff. July 19, 1961; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993)

RULES OF CIVIL PROCEDURE

Rule 69. Execution

(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

(b) Against Certain Public Officers. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Title 28, U.S.C., § 2006, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, ch. 130, § 8 (18 Stat. 401), U.S.C., Title 2, § 118, and when the court has given the certificate of probable cause for the officer's act as provided in those statutes, execution shall not issue against the officer or the officer's property but the final judgment shall be satisfied as provided in such statutes.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987.)

ALABAMA FRAUDULENT TRANSFER ACT

§ 8-9A-1. Definitions.

As used in this chapter:

(1) AFFILIATE.

a. A person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities,

1. As a fiduciary or agent without sole discretionary power to vote the securities; or

2. Solely to secure a debt, if the person has not exercised the power to vote;

b. A corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities,

1. As a fiduciary or agent without sole power to vote the securities; or

2. Solely to secure a debt, if the person has not in fact exercised the power to vote;

c. A person whose business is operated by the debtor under a lease or other agreement or a person substantially all of whose assets are controlled by the debtor, or

d. A person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) ASSET. Property of a debtor, but the term does not include:

a. Property to the extent it is encumbered by a valid lien;

b. Property to the extent it is generally exempt under nonbankruptcy law; or

c. An interest in property held in tenancy in common for life with cross contingent remainder to the survivor in fee to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) CLAIM. A right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) CREDITOR. A person who has a claim.

(5) DEBT. Liability on a claim.

(6) DEBTOR. A person who is liable on a claim.

(7) INCLUDES. Is not a limiting term.

(8) INSIDER. Includes:

a. If the debtor is an individual,

1. A relative of the debtor or of a general partner of the debtor;

2. A partnership in which the debtor is a general partner;

3. A general partner in a partnership described in subparagraph 2; or

4. A corporation of which the debtor is a director, officer, or person in control;

b. If the debtor is a corporation,

1. A director of the debtor;

2. An officer of the debtor;

3. A person in control of the debtor;

4. A partnership in which the debtor is a general partner;

5. A general partner in a partnership described in subparagraph 4; or

6. A relative of a general partner, director, officer, or person in control of the debtor,

c. If the debtor is a partnership,

1. A general partner in the debtor;

2. A relative of a general partner in, a general partner of, or a person in control of the debtor;

3. Another partnership in which the debtor is a general partner;

4. A general partner in a partnership described in subparagraph 3; or

5. A person in control of the debtor.

d. An affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

e. A managing agent of the debtor.

(9) LIEN. A charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(10) PERSON. An individual, partnership, corporation, association, organization, government, or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(11) PROPERTY. Both real and personal property, whether tangible or intangible, and any interest in property whether legal or equitable and includes anything that may be the subject of ownership.

(12) RELATIVE. An individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an indi-

vidual in an adoptive relationship within the third degree.

(13) TRANSFER. Every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(14) VALID LIEN. A lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings. (Acts 1989, No. 89-793, p. 1585, § 1.)

§ 13A-11-122. Conspiracy, combination or agreement to interfere with or hinder business.

Two or more persons who, without a just cause or legal excuse for so doing, enter into any combination, conspiracy, agreement, arrangement or understanding for the purpose of hindering, delaying or preventing any other persons, firms, corporation or association of persons from carrying on any lawful business shall be guilty of a misdemeanor. (Acts 1921, Ex. Sess., No. 23, p. 31; Code 1923, § 3447; Code 1940, T. 14, § 54; Code 1975, § 13-6-60.)